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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Federal Trade Commission, Plaintiff, v. James D. Noland, Jr., *et al.*, Defendants.	No. CV-20-0047-PHX-DWL **PLAINTIFF FEDERAL TRADE COMMISSION'S MOTION FOR PRELIMINARY INJUNCTION WITH ASSET FREEZE AND RECEIVERSHIP**

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INTRODUCTION

The Court based the current Preliminary Injunction (Doc. 109), with asset freeze and receivership, on its finding (1) "compelling evidence that Defendants are operating a pyramid scheme and that they have otherwise engaged in deceptive practices"; (2) that "the public equities, combined with the FTC's likelihood of success, outweigh Defendants' interest in continuing their business as-is"; (3) that "if Defendants were given access to the bank accounts and company, assets would be depleted"; and (4) that it would be "folly" to reinsert Jay Noland into management given "that [he] likely violated" the 2002 Permanent Injunction against him. (Doc. 106 at 26-29.) Since then, Defendants have violated the Court's Preliminary Injunction (*see infra* pp. 7-8), concealed then destroyed evidence (*see* Docs. 259, 277), fabricated evidence (Doc. 235), and used misleading and false statements to raise money for their defense and Jay Noland's $5,000-per-month luxury rental home (*see infra* pp. 8-9).

Under the *AMG* decision, the asset freeze and receivership are no longer necessary to preserve funds for a Section 13(b)-based monetary judgment. Both, however, remain necessary to preserve a monetary judgment under Section 19 of the FTC Act and in the Contempt Matter. Additionally, the receivership is necessary to prevent further harm to consumers—especially in light of Defendants' misconduct since entry of the Preliminary Injunction. The FTC therefore respectfully requests entry of a new preliminary injunction entering a new asset freeze and receivership.

BACKGROUND

I. THE 2002 NOLAND ORDER

In 2000, the FTC sued Jay Noland for falsely promising substantial income to consumers who enrolled in a pyramid scheme. (Doc. 8-19 at 8-17.) During that litigation, the Court sanctioned Noland for "fail[ing] to comply with the rules of discovery and this Court's [discovery] order" and "simply refus[ing] to participate in discovery." (Doc. 8-19 at 26-28.) Ultimately, the Court entered a Stipulated Final

Judgment and Order for Permanent Injunction (the "2002 Order") barring Noland from further pyramid schemes and from misrepresenting MLM participants' potential earnings. (Doc. 8-19 at 32-33.)

The 2002 Order binds not only Noland, but also "those persons in active concert or participation with [him] who receive actual notice" of the Order. (*Id.*; *see also* Fed. R. Civ. P. 65(d)(2) (same).) Scott Harris and Thomas Sacca admitted having actual notice of the 2002 Order prior to launching SBH. (Contempt Docs. 82-1 ¶ 4, 82-2 ¶ 4.)

II. PROCEDURAL HISTORY

A. The Court Issued a Temporary Restraining Order and Found Good Cause to Believe the Defendants Violated FTC Rules.

On January 8, 2020, the FTC filed its Complaint (Doc. 3) and Motion for Temporary Restraining Order (Doc. 8). The Complaint alleged three violations of Section 5 of the FTC Act related to Defendants' deceptive marketing of the Success By Health ("SBH") pyramid scheme (Counts I-III; later amended to include Defendants' "VOZ Travel" pyramid scheme, Doc. 205) and three violations of the FTC's Merchandise Rule and Cooling-Off Rule relating to their months-delayed shipments and failure to offer legally required refunds (Counts IV-VI). The accompanying TRO Motion established that the FTC was likely to prevail on all six counts. (Doc. 8 at 32-43.)

On January 13, 2020, the Court issued its TRO, finding, *inter alia*, good cause to believe that Defendants violated the Merchandise Rule and Cooling-Off Rule. (Doc. 21 at 2-3.) The Court froze Defendants' assets and appointed a temporary receiver. (*Id.* at 8-9, 16.) The FTC did not ask the Court to identify the particular claims for which the asset freeze would preserve money because, at that time, *all* of the claims permitted monetary relief under Section 13(b).[1] Additionally, the FTC did not know the magnitude of Defendants' rule violations—over $1 million in revenues—until well into discovery.

[1] Pursuant to Section 18 of the FTC Act, 15 U.S.C. § 57a(d)(3), the rule violations "constitute[] unfair or deceptive act[s] or practice[s] in violation of [the FTC Act]." Therefore, they are also actionable under Section 13(b), and, until *AMG,* the FTC could obtain monetary remedies for the rule violations under either Section 13(b) or Section 19.

B. Defendants Admitted to the Rule Violations in Their Answer.

On February 7, 2020, Defendants answered the FTC's First Amended Complaint ("FAC," Doc. 35) and admitted violating the Merchandise Rule and Cooling-Off Rule.

On the Merchandise Rule, Defendants admitted that they did "not offer any consumers, including consumers who wait for months to receive products or who never receive products, the option to cancel their order and obtain a refund." (Doc. 70 ¶ 1 (admitting FAC ¶ 95).) Additionally, they admitted that on at least some occasions, they "failed to ship orders within the timeframe required by the Merchandise Rule," "failed to offer customers the opportunity to consent to a delay in shipping or to cancel," and "failed to provide a prompt refund" when requested. (Doc. 70 ¶¶ 54, 55 (admitting in part FAC ¶¶ 123, 125).) Defendants conceded these practices "violated the Merchandise Rule . . . and therefore are unfair or deceptive acts or practices in violation of Section 5 of the FTC Act." (Doc. 70 ¶ 1 (admitting FAC ¶ 124).)

Defendants made similar admissions on the Cooling-Off Rule. In particular, they admitted they are "sellers" under the rule and have engaged in "door-to-door sales" of "consumer goods and services" within the meaning of the rule. (Doc. 70 ¶ 1 (admitting FAC ¶ 132).) Defendants further admitted that in some "door-to-door sales," they failed to inform consumers of "their right to cancel the transaction within three business days" and failed to provide the required "Notice of Cancellation" or "Notice of Right to Cancel." (Doc. 70 ¶ 56 (admitting in part FAC ¶ 133).) Finally, Defendants admitted that these practices "violate the Cooling-Off Rule . . . and therefore are unfair or deceptive acts or practices in violation of Section 5 of the FTC Act." (Doc. 70 ¶ 1 (admitting FAC ¶ 134).)

Defendants' most recent Answer makes the same admissions. (Doc. 222 ¶ 1 (admitting Second Amended Complaint ("SAC," Doc. 205) ¶¶ 173, 179), ¶¶ 106-108 (admitting in part SAC ¶¶ 170, 172, 180).)

C. The Court Questioned the Necessity of Addressing the Rule Violations at the Preliminary Injunction Hearing.

The parties submitted briefs in advance of the Court's February 12, 2020 preliminary injunction hearing. (Docs. 76, 81.) Notwithstanding their admissions, Defendants argued that the FTC was unlikely to prevail on its rule violation counts. (Doc. 76 at 26-27.) The FTC refuted those arguments. (Doc. 81 at 17-18.) The FTC's proposed preliminary injunction asked the Court to find good cause to believe the Defendants violated the Merchandise Rule and Cooling-Off Rule. (Doc. 81-5 at 2-4.)

During opening statements, the Court asked whether the rule-violation counts alone would support a preliminary injunction and receiver. FTC counsel responded that the FTC likely would not have sought a receiver if the rule violations hypothetically stood alone, and that the need for the receiver stemmed from the fact that "the company itself is overwhelmingly a fraud" in the pyramid scheme context. (Feb. 12, 2020 Tr. at 20:24-21:15.) In closing arguments, FTC co-counsel reaffirmed this position, adding that the FTC's likelihood of prevailing on the rule violations justified preliminary injunctive relief prohibiting further violations of the same rules. (*Id.* at 121:14-122:2.)

D. The Court Found "Compelling Evidence" That Defendants Deceptively Marketed the SBH Pyramid Scheme.

On February 27, 2020, the Court found the FTC likely to prevail based on "compelling evidence" that "Defendants are operating a pyramid scheme and . . . engaged in deceptive practices." (Doc. 106 at 29.) As to the pyramid claim, the Court found "ample evidence" that Defendants offered rewards "'largely' based on recruitment, not sales to ultimate users." (*Id.* at 11.) As to the deception claim, the Court wrote:

> Defendants . . . repeatedly emphasized that, through SBH, it was possible to obtain "financial freedom," a level of wealth that would exceed the income from standard employment. They advertised this could be accomplished in as little as a year and claimed that several Affiliates had already done so. These claims were false. These repeated, materially false representations were likely to mislead consumers.

(*Id.* at 25.)

In balancing the equities, the Court considered Defendants' arguments that the preliminary injunction "will likely put Success By Media out of business" and that SBH affiliates could be deprived of income. The Court did not dismiss these potential outcomes,[2] but determined that the "private injuries . . . do not outweigh the Commission's showing of likelihood of success [and that] the FTC is acting on behalf of the public interest." (*Id.* at 25-26 (internal quotation marks omitted).)

Finally, the Court rejected Defendants' proposal to insert a "monitor" rather than a receiver. The Court explained a receiver was necessary because, *inter alia*, "Noland had used the company as a personal piggy bank" and it would be "folly" to reinsert Noland—who "likely violated [the 2002 Order]"—into a management role. (*Id.* at 26-27.) The Court added that Defendants' apparent TRO violations (*see infra* pp. 7-8) "tend[ed] to suggest it would be inappropriate to allow Defendants to continue having any role in running a business that is likely deceiving and harming consumers." (Doc. 106 at 28.)

Regarding the alleged rule violations and related Section 19 counts, the Court wrote that "[d]uring oral argument, . . . the FTC clarified that the rules violations, standing alone, likely would not warrant injunctive relief." (*Id.* at 10.) As a result, the Court "focus[ed] on the [pyramid and misrepresentation counts]." (*Id.*)

E. Defendants Failed to Meaningfully Dispute Their Rule Violations in the Ongoing Summary Judgment Briefing.

On March 12, 2021, the FTC filed its Motion for Summary Judgment on Liability. (Doc. 285.) The FTC identified sales of at least $1 million violating the Merchandise or Cooling-Off Rules. (*Id.* at 16-17, 32-33 (citing Doc. 286-3 ¶¶ 19-27).) Defendants did

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[2] In fact, however, there continues to be no evidence that more than a very small handful of affiliates had *any* net positive income. The FTC's summary judgment motion, for example, showed that a subset of Defendants' current supporters—presumably among the most "successful" affiliates—earned an average of less than $100 for month, even when classifying the purchase price of products they consumed as "income." (Doc. 285 at 22-23.) Defendants did not dispute this point (or any of the FTC's consumer-harm data) in their opposition brief. (Doc. 348.)

not genuinely dispute their Merchandise Rule violations, instead simply declaring a "dispute over what product was not shipped" and whether "affiliates agreed to the delay."[3] (Doc. 348 at 4 n2.) Regarding the Cooling-Off Rule, Defendants admitted their violations and did not dispute the FTC's calculation of revenues from these sales (the basis for consume redress). (*Id.*) Instead, without elaboration and citing only to a 2,000-page exhibit (with no pin cite), they disputed whether "harm was caused." (*Id.*)

F. The FTC Seeks Monetary Relief in the Parallel Contempt Matter.

On January 17, 2020, shortly after the Court issued its TRO, the FTC moved for an order to show cause why Noland, Success By Media Holdings Inc., and Success By Media LLC should not be held in contempt of the 2002 Order. (Contempt Doc. 78.) The FTC provided evidence proving Noland and his companies violated almost every operative provision of the 2002 Order, including by operating the same SBH pyramid scheme and making the same misrepresentations on which the Court found the FTC likely to prevail. (*Id.* at 21-27.) The FTC later filed a show-cause motion against Harris and Sacca for the same Order violations. (Contempt Doc. 91.) In the Contempt Matter, the FTC seeks, and is entitled to, Defendants' net revenues as a compensatory contempt sanction to redress victimized consumers. *See infra* pp. 11-12. The FTC did not ask the Court to impose an asset freeze to preserve a civil contempt judgment because it would have been duplicative of the asset freeze to preserve a Section 13(b) monetary judgment.

III. DEFENDANTS' POST-TRO MISCONDUCT

Since the Court entered the TRO and Preliminary Injunction, Defendants have violated both Orders; concealed, destroyed, and fabricated evidence; and continued to deceive consumers to fund their defense and Jay and Lina Noland's luxury rental home.

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[3] Defendants cited evidence that they presumably think establishes some factual dispute, but they fail to explain how. (Doc. 348 at 4 n.2.) Their "Founders Agreement," for example, estimates a Founder Pack shipping date "by the end of December 2017." (Doc. 335-6 at 18.) The undisputed evidence shows that $370,000 in Founders Pack products remained unshipped in *March 2018*. (Doc. 286-3 at 8-9.)

A. Defendants Violated the TRO and Preliminary Injunction.

From the start, Defendants violated the TRO in several ways. For example, the TRO required Defendants to cease "[t]ransacting any of the business of the Receivership Entities" and to "immediately" "provide a copy of [the TRO] to each affiliate, . . . employee, . . . and representative of any Defendant." (Doc. 21 at 23, 26-27.) Instead, four hours after being served with the TRO, Noland went to the beach, where he used the SBH Facebook account to broadcast a soliloquy to Affiliates, never mentioning the TRO, but stressing that Defendants "do[] things the right way, bringing tons of integrity." (Docs. 26-1 ¶ 5, 81-2 ¶ 39.) He and Scott Harris continued to host SBH's daily conference calls, in violation of the TRO, until January 22, 2021. (Doc. 81-2 ¶ 40.) Defendants did not disclose the TRO to SBH affiliates until January 24. (Ex. 2 (Mendelson Decl.) at 7.)

The TRO also required Defendants to "immediately" surrender to the Receiver "[a]ll keys, codes, user names and passwords," all documents "of or pertaining to the Receivership Entities," and all "electronic devices used to conduct [Receivership Entity business" to the Receiver. (Doc. 21 at 21-22.) Defendants treated the Court's commands as optional. The Receiver "encountered considerable difficulty" obtaining documents and electronic data, with Defendants providing no "meaningful access to the company's electronic data until . . . two weeks after service of the TRO" and leaving "several" of the Receiver's requests outstanding one month post-TRO. (Doc. 82-1 at 7.) Although the Court was somewhat forgiving given the "enormous time pressure" on the Defendants (Doc. 106 at 28), it is now clear that timing was not the issue. Despite, for example, indisputably using their cell phones extensively for Receiver Entity business, Defendants *never* turned them over to the Receiver and concealed from the Receiver (and then destroyed) evidence of their use of the Signal encrypted messenger service for "important" SBH business. (Doc. 259 at 7 (citing Doc. 259-2) .)

Finally, the TRO and Preliminary Injunction required the Nolands to "immediately" "[t]ransfer to the . . . United States all . . . Assets located in foreign

countries" that they own or control. (Docs. 21 at 11-12, 109 at 9.) In the weeks before the TRO, the Nolands used SBH money for extravagant expenditures like a $72,000 down payment on a $145,000 Range Rover and $50,000 on luxury motorbikes in Uruguay. The Nolands admit all of these items are personal assets (Doc. 224 at 22), but took no steps to repatriate them.

B. Defendants Concealed, Destroyed, and Fabricated Evidence.

As set forth in the FTC's Motion for Spoliation Sanctions (Docs. 259, 277), Defendants, after discovering the FTC's investigation, began using encrypted Signal and ProtonMail services to discuss "important things" and "anything sensitive." (Doc. 259 at 7-9.) Defendants never provided the Signal messages or disclosed their existence, even when Noland was asked directly about encrypted messages at his February 2020 deposition. (Doc. 259 at 9-12.) Then, in August 2020, Defendants simultaneously destroyed their Signal messages. (Doc. 259 at 11.) Defendants separately deleted their post-TRO ProtonMail emails with SBH affiliates (Docs. 259 at 11-12, 277 at 4 n.3.)

Noland also likely fabricated evidence that he thought could justify his massive transfers of company cash to himself. Specifically, the FTC's Notice Pursuant to Ethics Rule 3.3 (Doc. 235) describes substantial evidence that Noland, in response to a January 2020 document request, fabricated a "January 2017" Royalty Agreement and "September 2018" addendum. Noland also told the Court under oath that this licensing arrangement started in January 2017 (Doc. 157-1 at 4), notwithstanding that he told his accountant in April 2018 that no such agreement was "in place" (Ex. 1 (Rottner Decl.) at 7.)

C. Defendants Continue to Mislead Consumers to Take Their Money.

In 2020 alone, Defendants raised almost $600,000 to fund their defense, with the vast majority of that money apparently coming from a small group of SBH affiliates. (Doc. 282 at 2-7.) Beyond that, as of December 2020, SBH affiliates had paid at least $60,000 on Noland's $5,000-per-month luxury rental home, with affiliates Jeffrey and Amber Wright contributing an additional $130,000 for other expenses. (Docs. 237 at 6-7, 350-1 at 5-6.) Because Defendants deleted their communications with affiliates, there is

little evidence of what they say to solicit these funds. The available evidence, however, establishes Defendants are taking money from SBH affiliates based on misleading and outright false statements about Defendants' business practices and this litigation.

For example, in one fundraising video, Noland raised affiliates' ire by claiming the FTC and Receiver wrongfully denied them access to a "designated bank account" that held affiliates' accrued "e-Wallet" commissions. (Ex. 1 at 4-5.) That is false; there is no such account. In fact, when asked at his deposition whether there was a "separate bank account" for e-Wallet funds, Noland replied, "Not that I'm aware of." (Doc. 287-4 at 20 (97:6-99:4).) As of the TRO, no single SBM account held funds sufficient to cover e-Wallet balances, and corporate liabilities exceeded cash assets. (Doc. 82-1 at 10, 12.)

In another recent video, Defendants fundraised by misrepresenting the asset freeze's effect. As a fundraising link scrolled along the bottom of the screen, Defendants' counsel, for example, said the FTC "took [the Nolands' six-year-old son's] money." (Ex. 1 at 5.) Noland "confirmed" that this was "fact." (*Id.*) It is fiction. There are no frozen assets in Noland's son's name (*id.* at 7), and Defendants' counsel did not identify any when asked about his remarks (Ex. 2 at 2-3, 5). As a ticker at the bottom of the screen continued to solicit funds, Noland then claimed that the FTC had frozen Scott Harris's son's bank account, which left him "on the way going to college with no money," meaning that "volunteers had to give Scott's son money to go to college." (Ex. 1 at 6.) Donors relied on these claims. (*Id.* (donor stating Harris's son "couldn't continue in college because there was a joint checking account").) Harris's sworn disclosures reveal that the frozen account had about $200. (*Id.* at 7-8.)

Finally, one of Noland's new business ventures raises significant red flags that Noland continues to misrepresent material facts to consumers. Specifically, Noland now sells "ConfidenceTones"—literal audio "tones" and "sound frequencies" that Noland claims can "help relieve body aches and pains without dangerous medications," "help you lose weight," and "help lower your blood pressure." (Ex. 1 at 42.)

ARGUMENT

The Court has authority to enter a preliminary injunction with a new asset freeze and receivership to preserve funds for a monetary judgment under Section 19 of the FTC Act and in the Contempt Matter and to protect consumers from fraud.[4] Here, the evidence justifies the Court's exercising that authority because the FTC is likely to prevail, the equities favor the FTC, and, without the asset freeze and receivership, Defendants will quickly spend funds currently being held for their victims and will accelerate their efforts to obtain yet more money from their victims. Finally, the procedural history of this litigation provides no basis to deny this Motion.

I. THE COURT HAS AUTHORITY TO ORDER AN ASSET FREEZE AND RECEIVERSHIP.

In any case seeking "final equitable relief," district courts have "inherent equitable power to issue provisional remedies ancillary" to that relief. *Reebok Int'l, Ltd. v. Marnatech Enters., Inc.*, 970 F.2d 552, 55 (9th Cir. 1992); *see also id.* at 560 ("[T]he authority to issue a preliminary injunction rests upon the authority to give final relief . . . ." (quoting *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982)). Here, because the Court can provide monetary relief and a permanent injunction, it may take steps to preserve funds and prevent unlawful conduct while litigation is pending.

A. The Court May Preserve Assets for Consumer Redress by Imposing an Asset Freeze and Receivership.

"[T]he authority to freeze assets by a preliminary injunction must rest upon the authority to give a form of final relief to which the asset freeze is an appropriate provisional remedy." *Reebok*, 970 F.2d at 560. Courts, therefore, have "the power to

[4] The FTC's attached proposed new Preliminary Injunction includes asset freeze and receivership provisions identical to the current Preliminary Injunction (Doc. 109). If the Court grants this Motion, the same provisions can be struck from the original Preliminary Injunction after the Ninth Circuit returns jurisdiction over that Order to this Court. The conduct provisions in the original Preliminary Injunction (Doc. 109, §§ I-II, IX-XII) should remain in place because *AMG* plainly provides no basis to modify them.

issue a preliminary injunction [with asset freeze] to prevent a defendant from dissipating assets in order to preserve the possibility of equitable remedies." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988) (*en banc*). Receiverships, like asset freezes, are permitted to preserve funds for consumer redress. *See, e.g*, *SEC v. Holt*, 2004 WL 1962177, at *1 (D. Ariz. July 29, 2004) (receiver appointed to "marshal and preserve assets . . . for the benefit of the victims of the fraudulent schemes").

Here, as explained below, the Court still has authority, even after *AMG*, to order *final* monetary relief under Section 19 of the FTC Act and pursuant to its contempt authority. The Court already reached the same conclusion when anticipating the effect of *AMG*. (Doc. 242 at 7.) The Court therefore has the power to grant *preliminary* relief to preserve collectability of those judgments.

Section 19. In any case where a "person, partnership, or corporation violates any rule under this subchapter [the FTC Act, 15 U.S.C. §§ 41-58] respecting unfair or deceptive acts or practices,"[5] with certain exceptions not relevant here, "the Commission may commence a civil action . . . in a United States district court." 15 U.S.C. § 57b(a)(1). In such cases, the Court may "grant such relief as the court finds necessary to redress injury to consumers," including equitable remedies such as "rescission or reformation of contracts" and the "the refund of money." 15 U.S.C. § 57b(b). The Court can therefore provide preliminary relief to preserve that final relief.

Contempt. "There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*,

[5] The Merchandise Rule and Cooling-Off Rule both satisfy these criteria. The authority for the Cooling-Off Rule is 15 U.S.C. §§ 41-58 (*see* 16 C.F.R. part 429), and violations "constitute[] an unfair and deceptive act or practice" (*see* 16 C.F.R. § 429.1). The authority for the Merchandise Rule is 15 U.S.C. § 57a (*see* 16 C.F.R. part 435), and, like the Cooling-Off Rule, violations "constitute[] . . . an unfair or deceptive act or practice" (*see* 16 C.F.R. § 435.2).

384 U.S. 364, 370 (1966). The "measure" of that inherent power "is determined by the requirements of full remedial relief." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949). District courts, accordingly, "have broad discretion to use consumer loss"—*i.e.*, defendants' net revenues—"to calculate sanctions for civil contempt of an FTC consent order." *FTC v. EDebitPay, LLC*, 695 F.3d 938, 945 (9th Cir. 2012). Courts have uniformly interpreted their "broad equitable power to order appropriate relief in civil contempt proceedings," *SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir. 2003), to permit asset freezes and receiverships to preserve collectability of potential civil contempt sanctions.[6] We are aware of no contrary authority.

B. The Court May Also Appoint a Receiver to Prevent Further Consumer Harm During the Litigation.

As the Court noted during the May 3 status conference, it also has authority to appoint a receiver for reasons unrelated to the asset freeze—namely, to prevent further violations during this litigation. (May 3, 2021 Tr. at 35:8-37:14.) The cases cited by the Court at the hearing all support that point. (*Id.*) In another example, the Seventh Circuit affirmed a receivership, even "absent insolvency," where the SEC's "prima facie showing of fraud and mismanagement" made it "hardly conceivable that the trial court should have permitted those who were enjoined from fraudulent misconduct to continue in control." *SEC v. Keller Corp.*, 323 F.2d 397, 403 (7th Cir. 1963); *see also SEC v. Bowler*, 427 F.2d 190, 198 (4th Cir. 1970) ("[A] receiver is permissible and appropriate where necessary to protect the public interest and where it is obvious, as here, that those

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[6] *See, e.g.*, *McGregor v. Chierico*, 206 F.3d 1378, 1381 (11th Cir. 2000) (citing district court's asset freeze and receivership); *FTC v. Gill*, 183 F. Supp. 2d 1171, 1176-77 (C.D. Cal. 2001); *FTC v. Data Med. Cap. Inc.*, No. 99-cv-1266, 2010 WL 1049977, at *2-3 (C.D. Cal. Jan. 15, 2010); *FTC v. Dayton Family Prods., Inc.*, No. 97-cv-00750, Docs. 133, 173 (D. Nev. Jan. 28, 2013); *FTC v. Latrese & Kevin Enters. Inc.*, 2012 WL 12952608, at *2 (M.D. Fla. Nov. 19, 2012); *FTC v. Zuccarini*, No. 01-cv-4854 (D.D.C. Dec. 21, 2006); *FTC v. Int'l Prod. Design, Inc.*, No. 97-cv-1114, Docs. 81, 84 (E.D. Va.); *FTC v. Neiswonger*, No. 06-cv-2225, Docs. 29, 140 (E.D. Mo.).

who have inflicted serious detriment in the past must be ousted."); *SEC v. S&P Nat'l Corp.*, 360 F.2d 741, 750-51 (2d Cir. 1966) (affirming receiver where "primary purpose of the appointment was promptly to install a responsible officer of the court who could bring the companies into compliance with the law," in addition to preserving assets).

II. THE EVIDENCE JUSTIFIES ENTRY OF THE PRELIMINARY INJUNCTION.

In "statutory enforcement" actions, the FTC need not establish irreparable harm in order to obtain a preliminary injunction. *See FTC v. Consumer Defense, LLC*, 926 F.3d 1208, 1214 (9th Cir. 2019).[7] Therefore, the Court need only "(1) determine the likelihood that the Commission will ultimately succeed on the merits and (2) balance the equities." *Id.* The FTC satisfies both prongs.

A. The FTC Is Likely to Prevail on the Merits.

1. Noland Matter (No. CV-20-0047-DWL)

Counts I-III (Pyramid and Deception). The Court already found that the FTC is likely to prove its pyramid and deception counts (Counts I-III.) *See supra* pp. 4-5. Since that time, the evidence has only gotten stronger. *See generally* Doc. 285. (Although the FTC no longer seeks monetary relief under these counts, the scope of Defendants' misconduct is relevant to the question whether a receiver is appropriate.)

Counts IV-VI (Rule Violations). As described above, Defendants admitted to

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[7] Because the statutory claims provide adequate basis for the preliminary injunction, the Court need not resolve the question whether the FTC needs to show irreparable harm to obtain a preliminary injunction when the FTC only invokes the Court's contempt authority (rather than also alleging statutory violations). Nevertheless, at least two courts have held that the FTC need *not* show irreparable harm in contempt cases. *See, e.g.*, *FTC v. Vocational Guides, Inc.*, 2008 WL 4908769, at *1 (M.D. Tenn. Nov. 12, 2008); Order, *FTC v. Gill, et al.*, No. CV-98-1436-LGB (MCx), Doc. 171 at 15-16 and n.2 (C.D. Cal. Jun. 5, 2001), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2001/06/gillordergrantingexparteapp.pdf. In any event, the FTC can establish irreparable harm here with the evidence of Defendants' post-TRO misconduct, *supra* pp. 6-9.

violating the Merchandise Rule and Cooling-Off Rule, and the undisputed evidence establishes that those violations tainted at least $1 million in sales. *See supra* pp. 5-6.

2. Contempt Matter (No. CV-00-2260-DWL)[8]

As an initial matter, Harris, Sacca, and the SBM Entities (with Noland, the "Contempt Defendants") were bound by the 2002 Order, despite only Noland being named in it, because they all had notice of the Order and worked in concert with Noland. *See* Fed. R. Civ. P. 65(d)(2).

Section I (Pyramid Scheme). Additionally, the evidence presented at, and in advance of, the February 2020 preliminary injunction hearing establishes that the Contempt Defendants all violated the 2002 Order. In particular, Section I of the 2002 Order prohibits the Contempt Defendants from engaging in a "prohibited marketing scheme," defined using the same language used by the Ninth Circuit for identifying pyramid schemes. *Compare* Contempt Doc. 66 at 3, *with FTC v. BurnLounge, Inc.*, 753 F.3d 878, 883 (9th Cir. 2014). The FTC, therefore, is likely to prevail for the same reasons the Court explained in its preliminary injunction decision. (Doc. 106 at 10-20.)

The 2002 Order, in fact, defines "retail sales" more narrowly, allowing rewards based only on sales to "third-party"—*i.e., non*-affiliate—end users, and expressly prohibiting rewards based on "sales made by participants . . . to other participants or recruits or to such a participant's own account." (Contempt Doc. 66 at 3-4.) Here, the FTC presented evidence that affiliates accounted for *over 90%* of purchases from SBH—which are the sole basis for rewards. (Doc. 8 at 18; Doc. 285 at 7, 30.) Defendants have never genuinely disputed this fact. Additionally, the evidence cited in the FTC's summary judgment motion establishes Defendants' "VOZ Travel" program was also a

[8] The FTC need only establish that it is likely to prevail in *either* the Noland Matter *or* the Contempt Matter to justify entry of a new asset freeze and receivership. Although Lina Noland is not a party in the Contempt Matter, and therefore might not be subject to an asset freeze based solely on that matter, all of her assets are jointly owned by Jay Noland and therefore subject to a contempt-based asset freeze on that basis. *Compare* Ex. 1 at 51-62, *with* Doc. 203-2 at 11-28.

pyramid scheme (Doc. 285 at 17-20, 30-31). Defendants do not even address this evidence in their opposition (Doc. 348). Therefore, the FTC is likely to prove that Contempt Defendants violated the 2002 Order by operating VOZ Travel and SBH.

Section II (Misrepresentations). Section II of the 2002 Order prohibits the Contempt Defendants, in connection with any MLM program, "from making. . . any false or misleading statement or misrepresentation of material fact," including about the potential earning or income" or "benefits" or such a program. The Court has already found "compelling evidence" that they did exactly that. (Doc. 106 at 20-25.)

B. The Equities Favor Entry of the Preliminary Injunction.

As the Court already held, "the public equities, combined with the FTC's likelihood of success, outweigh Defendants' interest in continuing their business as-is," even given the risk Success By Media would be effectively shut down and affiliates' incomes interrupted. (Doc. 106 at 25-26.) Neither *AMG* nor any other events during this litigation change that conclusion. In fact, the Defendants' continued misconduct (*see supra* pp. 6-9) and inability to refute the FTC's evidence that affiliates were not earning income through SBH (*see supra* p. 5 n.2) tip the equities further in the FTC's favor.

III. THE ASSET FREEZE AND RECEIVERSHIP ARE APPROPRIATE TO PRESERVE ASSETS AND PREVENT CONSUMER HARM.

At the outset, the FTC argued that an asset freeze and receivership were necessary to preserve assets for consumer redress and to protect consumers from further harm. (Doc. 8 at 44-50.) The Court agreed. (Doc. 106 at 26-29.) Both findings remain correct.

First, as to the asset freeze, nothing relevant has changed. *AMG* changes part of the *basis* for the FTC's monetary recovery, but not the agency's ability to recover. *See supra* pp. 10-12. Because the FTC likely will obtain a monetary judgment under Section 19 and in contempt, it is nearly certain that any money the Court releases from the asset freeze is money that will be denied to Defendants' victims.

Second, the need for a receiver to prevent consumer harm has only gotten stronger. (*See* Doc. 106 at 27-28 (justifying receivership on this basis).) In that time,

Defendants have violated the Court's Orders; concealed, destroyed, and fabricated evidence; and lied to consumers in order to take their money. *See supra* pp. 6-9. Restoring them to power would only embolden their deceptive conduct. In fact, it is telling that even *after* the Defendants learned of the FTC's investigation in May 2019 (Doc. 259 at 4), they continued their pyramid scheme in violation of the 2002 Order and then launched a *second* pyramid scheme, VOZ Travel.

IV. THE PROCEDURAL HISTORY IS NOT A BASIS FOR DENYING THE PRELIMINARY INJUNCTION.

At the May 3 status conference, the Court expressed concerns that (1) it had not previously made findings on the FTC's Section 19 or contempt claims and that doing so now would "pose a lot of problems . . . to try to do that retroactively" (May 3, 2021 Tr. at 20), (2) the FTC had purportedly conceded that Section 19 claims did not justify the asset freeze and Receivership (*id.* at 18-20), and (3) if the asset freeze ended, the Receiver would become unnecessary (*id.* at 37-38). The FTC addresses these concerns below.

A. The Court Can Make the Necessary Factual Findings in Response to This Motion and Without the Need for an Evidentiary Hearing.

It is true that the Court's Preliminary Injunction did not rely on an express finding that the FTC was likely to prevail on the Section 19 counts or in contempt. Making the findings in response to *this* Motion, however, need not pose any significant problems.

The Court is not required to hold an evidentiary hearing before granting a preliminary injunction "unless disputed questions of material fact exist." *Metro-Goldwyn-Mayer Studios, Inc., v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1240 (C.D. Cal. 1997). The Ninth Circuit has gone farther, holding that even where there *is* a dispute of fact, no hearing is required provided the parties have "sufficient opportunity to present their case without using oral testimony," such as by affidavit. *San Francisco-Oakland Newspaper Guild v. Kennedy ex rel. NLRB*, 412 F.2d 541, 546 (9th Cir. 1969).

Here, there is no dispute of material fact regarding the Section 19 claims.

Defendants admitted their violations in their Answer and failed to raise a genuine material dispute in response the FTC's summary judgment motion. *See supra* pp. 3, 5-6.

Moreover, regarding the contempt allegations, the Court need not hold a hearing because it *already* held a hearing on the relevant factual questions: whether the FTC is likely to prove that Defendants operated a pyramid scheme and made misrepresentations to promote the scheme. The Court can apply the contempt burden of proof (clear-and-convincing) rather than the FTC Act burden of proof (preponderance of the evidence) without re-hearing the overwhelming evidence already presented.

B. The FTC Did Not Concede That It Is Not Entitled to the Asset Freeze and Receivership.

The preliminary injunction hearing transcript, *see supra* p. 4, makes clear that the FTC did not concede that the asset freeze and receivership were unnecessary to preserve funds for a Section 19 judgment (much less a contempt judgment, which was not at issue). Rather, the FTC explained that the scope of Defendants' wrongdoing—going well beyond the rule violations—warranted broad relief. That remains true—Defendants' sweeping misconduct, including their deceptive marketing of a pyramid scheme, still justifies broad relief. Additionally, the FTC *did* ask the Court to find the FTC likely to prove the rule violations. *See supra* p. 4.

C. The Receivership Is Necessary to Prevent Consumer Harm Even in the Absence of an Asset Freeze.

Even if the Court were to return the frozen funds to the Defendants, the Receivership remains necessary. Neither the 2002 Order nor the existing Preliminary Injunction has stopped the Defendants from defrauding consumers. Returning them to management roles surely would only worsen that problem.

CONCLUSION

For the foregoing reasons, the FTC respectfully requests that the Court enter the attached proposed Preliminary Injunction.

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Respectfully submitted,

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